BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHAWN CLOSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,724
OLSTEN STAFFING	)	
Respondent	)	
AND	)	
	)	
ITT SPECIALTY RISK SERVICES, INC.	)	
Insurance Carrier	)	

SHAWN CLOSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,219
ASSOCIATED WHOLESALE GROCERS	)	
Respondent	)	
AND	)	
	)	
GENERAL ACCIDENT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent Olsten Staffing and its insurance carrier ITT Specialty Risk Services, Inc., appeal the July 7, 1999 preliminary hearing Order and the July 12, 1999 Nunc Pro Tunc Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The claims for injury by accident alleged in Docket Nos. 241,724 and 244,219 were consolidated for hearing and trial. In his Order and Nunc Pro Tunc Order, Judge Howard awarded claimant preliminary hearing benefits of medical treatment and temporary total disability compensation. The costs for providing these benefits were assessed against Olsten Staffing and ITT Specialty Risk Services, Inc. (hereinafter Olsten), the respondent and insurance carrier, respectively, in Docket No. 241,724. Olsten appeals arguing it should not be liable for those benefits because claimant suffered a subsequent intervening injury while employed with Associated Wholesale Grocers (hereinafter AWG). That subsequent injury or aggravation is the subject of Docket No. 244,219. The issue for

Appeals Board review, therefore, is whether claimant's current need for preliminary hearing benefits is the result of the admitted accidental injury that occurred on August 27, 1998 while claimant was employed with Olsten.

Claimant argues the Appeals Board is without jurisdiction to review the preliminary hearing decision of Judge Howard because Olsten stipulated in Docket No. 241,724 that claimant suffered personal injury by accident arising out of and in the course of his employment with Olsten on August 27, 1998.

FINDINGS OF FACT

1. Claimant was employed by Olsten from August 25, 1998 through September 22, 1998. He injured his back on August 27, 1998 while lifting a box. Claimant denies having any problems with his back or leg before this injury.

2. Claimant received authorized medical treatment for his injury through Olsten. This treatment consisted of an examination by Dr. Walker J. Patrick and physical therapy. Claimant was diagnosed with a low back strain. He was released to return to work without restrictions, on September 4, 1998. Claimant continued to work for Olsten through September 22, 1998 performing his regular job duties. Claimant did not make any complaints or seek additional treatment while employed by Olsten.

3. Claimant testified that although he returned to his regular job duties and did not request additional treatment, he continued to have low back and left leg pain. Claimant did not relate his leg pain to his back injury, however, thinking instead that "it was sore muscles, hamstring or something."

4. On September 11, 1998 claimant completed some employment paperwork and underwent a physical examination for AWG. Claimant mentioned his back injury at Olsten but represented that he had no disability. During that examination, however, claimant stated that he had a limited ability to bend at the waist due to pain down his leg and that the doctor made a note of it.

5. Claimant worked for AWG from September 28, 1998 through October 25 or 30, 1998. His job duties as an order filler involved locating products in the warehouse, loading them on a pallet and taking them to a loading dock. Claimant regularly lifted weights up to 65 pounds and was occasionally required to lift up to 110 pounds.

6. Claimant testified that his work at AWG was more strenuous than his work at Olsten and caused his back and left leg pain to worsen to the point where on or about October 30, 1998 claimant left his employment at AWG due to pain. After claimant left work at AWG, however, his symptoms subsided to a level that existed before his employment with AWG. Claimant testified that he believed he did not suffer any

permanent increase in symptoms or pain from the one month period he worked for AWG.

7. Although claimant made a claim for compensation and filed an Application for Hearing alleging injury to his low back and left lower extremity while working for AWG, at the preliminary hearing claimant denied injuring himself in any way while employed by AWG.

CONCLUSIONS OF LAW

An ALJ's preliminary award under K.S.A. 1998 Supp. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.[1] "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."[2] Whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[6] It is not compensable, however, where the worsening or new injury would

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[1] K.S.A. 1998 Supp. 44-551(b)(2)(A).

[2] K.S.A. 1998 Supp. 44-534a(a)(2).

[3] K.S.A. 1998 Supp. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 1998 Supp. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 1998 Supp. 44-501(g).

[6] Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972).

have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[7] The Appeals Board finds that claimant's work at AWG following his employment by Olsten, was a temporary aggravation and, therefore was not the cause of claimant's condition at the time of the preliminary hearing. Claimant's current condition, therefore, is compensable as a direct and natural consequence of the original August 27, 1998 injury.

In its brief to the Appeals Board, counsel for AWG incorrectly cites West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, 859 P.2d 382 (1993), for the proposition that an "employee cannot be compensated when a pre-existing injury is temporarily aggravated and not permanently impaired." The holding by the Kansas Court of Appeals in West-Mills was that the trial court's award of permanent partial disability compensation was improper "where the permanency of the condition does not result from the work-related injury."[8] The court stated:

> Dillon argues that it should not be held liable for permanent partial disability benefits where the permanency of West-Mills' condition did not result from any injury she suffered during the course of her employment. Dillon compares West-Mills' situation with an epileptic who suffers a seizure at work, an individual with multiple sclerosis who falls at work, or a hemophiliac who cuts himself or herself at work. Dillon contends that, while the employer may be liable for expenses resulting from the seizure, the fall, or the cut, the employer should not be held liable for the underlying, preexisting epilepsy, multiple sclerosis, or hemophilia.[9]

Likewise, AWG should not be held liable for claimant's medical treatment and temporary total disability before or after his employment with AWG, when claimant said his condition returned to its preemployment level. But, during the time claimant was working at AWG, AWG and its insurance carrier could be responsible for medical treatment for the temporary aggravation that occurred as a result of claimant's employment with AWG. Nevertheless, since the ALJ's Order in this case is prospective and deals only with the cost of medical treatment from the date of the preliminary hearing Order and temporary total disability compensation commencing May 6, 1999 (a date after the filing of claimant's Application for Preliminary Hearing) the assessment against Olsten and its insurance carrier was proper and should be affirmed.

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[7] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[8] West-Mills at page 567.

[9] West-Mills at page 567.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated July 7, 1999 and Nunc Pro Tunc Order dated July 12, 1999 entered by Administrative Law Judge Steven J. Howard should be, and are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
Max C. Schulz, Jr., Overland Park, KS
John R. Emerson, Kansas City, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director